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Supreme Court, U.S.
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CLERK

No. _____

In the Supreme Court of the United States

October Term, 1987

NATIONAL COUNCIL ON COMPENSATION INSURANCE,
Petitioner,

v.

FRED KYLE and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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42 pp

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FRED KYLE, *Petitioner,*

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS. UNITED STATES DEPARTMENT OF LABOR,
Respondents

No. 85-3535.

United States Court Of Appeals,
Sixth Circuit,

Argued Oct. 2, 1986.

Decided May 18, 1987.

Julian N. Henriques (argued), Legal Asst. Foundation of Chicago, Jean Goodwin, Legal Asst. Foundation, Chicago, Ill., for petitioner.

J. Michael O'Neill, Sylvia T. Kaser (argued), Washington, D.C., for respondents.

Before MERRITT, GUY and NORRIS, Circuit Judges.

ALAN E. NORRIS, Circuit Judge.

Fred Kyle seeks review of an order of the Benefits Review Board of the United States Department of Labor which affirmed the decision of the Administrative Law Judge to deny him benefits under the Black Lung Benefits Act, 30 U.S.C. § 901 *et seq.*

In essence, Kyle's appeal is grounded on two contentions—first, that the A.L.J. erred by failing to consider his entitlement to an "interim presumption" of disability under 20 C.F.R. § 401.490 in connection with his claim for

benefits, and second, that when that "interim presumption" is utilized he is entitled to black lung benefits as a matter of law. In addition, Kyle disputes some of the factual findings of the A.L.J., but, as our review of the record leads us to conclude that these findings are supported by substantial evidence, they may not be set aside on appeal. *Moore v. Califano,* 633 F.2d 727, 729 (6th Cir. 1980). However, because we agree with Kyle's first contention, we reverse the Board's decision and remand for further proceedings.

On February 15, 1980, petitioner Kyle filed his claim for benefits. This claim was subsequently denied and Kyle requested a hearing. This hearing was held on May 25, 1982, and the A.L.J. made the following findings of fact: that Kyle was a coal miner for approximately eight and one-half years, ending in 1951; that he had pneumoconiosis which was depicted by X-ray; that blood gas and pulmonary function studies were within normal limits; that S.M. Hessl, M.D., examined Kyle in May 1980 and diagnosed chronic bronchitis and coal miner's pneumoconiosis arising out of his coal mine employment; that Dr. Hessl also found Kyle had an AMA Class III respiratory impairment, arteriosclerotic heart disease and right bundle branch block; and that Kyle's file was referred to a medical consultant, who concluded that he was not totally disabled from pneumoconiosis and that any respiratory disability that he had was the result of smoking. The A.L.J. determined that Kyle had not met his burden on proving that he was totally disabled from pneumoconiosis, and that he was therefore not entitled to black lung benefits.

In order to be eligible for benefits under the Act, a miner must demonstrate that he is totally disabled due to

pneumoconiosis. 30 U.S.C. §§ 901(a), 902(b). To aid claimants in meeting this burden, the agencies which have administered the benefits program have provided a number of presumptions. The presumption at issue here is the one found in 20 C.F.R. § 410.490, which states, in part:

> (b) *Interim presumption.* With respect to a miner who files a claim for benefits before July 1, 1973 . . . such miner will be presumed to be totally disabled due to pneumoconiosis . . . if:
>
> (1) One of the following medical requirements is met:
>
> (i) A chest roentgenogram (X-ray) . . . establishes the existence of pneumoconiosis . . .
>
> . . .
>
> (2) The impairment established in accordance with paragraph (b)(1) of this section arose out of coal mine employment . . . .
>
> . . . .
>
> (c) *Rebuttal of presumption.* The presumption in paragraph (b) of this section may be rebutted if:
>
> (1) There is evidence that the individual is, in fact, doing his usual coal mine work or comparable and gainful work. . . .

Because Kyle's claim was filed long after July 1, 1973, it would seem that he would not be able to claim the benefit of this presumption. However, Kyle contends that he is entitled to the presumption in view of a 1977 amendment to the Black Lung Benefits Act:

> (f)(1) The term "total disability" has the meaning given it by regulations of . . . the Secretary of Labor . . . except that—

. . . .

(2) Criteria applied by the Secretary of Labor in the case of—

(C) any claim filed on or before the effective date [March 31, 1980] of regulations promulgated under this subsection by the Secretary of Labor;
shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973, whether or not the final disposition of any such claim occurs after the date of such promulgation of regulations by the Secretary of Labor.

30 U.S.C. § 902(f)(2) (emphasis added).

Kyle argues that the effect of the "shall not be more restrictive" language of this amendment is to require that his case be decided in light of legal criteria in place on June 30, 1973, and that includes 20 C.F.R. § 410.490. Because the A.L.J. found that an X-ray established the existence of pneumoconiosis, and Dr. Hessl concluded that Kyle's pneumoconiosis arose out of coal mining, it is apparent that, had the A.L.J. considered Kyle's claim in the light of Section 410.490 and also concluded that Dr. Hessl's report established causation, then Kyle would have been entitled to the presumption of total disability due to pneumoconiosis.

However, the Department of Labor contends that Kyle failed to raise this issue at any stage of the proceedings below, and he is therefore precluded from raising it before this court for the first time.

While an appellate court generally will not address an issue which was not presented below, an exception is made when raising the issue would have been futile. *See, e.g., Youakim v. Miller,* 425 U.S. 231, 235, 96 S.Ct. 1399, 1402,

47 L.Ed.2d 701 (1976); *Penland v. Warren County Jail*, 759 F.2d 524, 531 n. 6 (6th Cir. 1985). At the time of the A.L.J.'s decision, the Board had rejected the application of Section 410.490 sought by Kyle. *See Lynn v. Director, Office of Workers' Compensation Programs*, 3 BLR 1-125, 126 (1981). The Board has also consistently held that it will not allow an A.L.J. to consider 20 C.F.R. § 410.490 in connection with claims filed after July 1, 1973, unless that consideration is required by the court of appeals of that particular circuit. *See, e.g., Kimmel v. Diamond Coal Co.*, 6 BLR 1-288, 291-93 (1983). In *Kimmel*, which was decided almost two years before the Board's decision in this case, the Board held that it would not apply Section 410.490 to claims arising in the Sixth Circuit which were filed after July 1, 1973. Accordingly, it would have been futile for Kyle to raise the argument.

The department next argues that, because Kyle's claim was not filed before July 1, 1973, the language of Section 410.490 itself precludes his reliance upon its presumption. It disputes Kyle's contention that the "shall not be more restrictive" language of the 1977 amendment to 30 U.S.C. § 902(f)(2) revives the application of the Section 410.490 presumption to him, since the department contends that the language refers not to evidentiary or adjudicatory criteria such as length of service, but only to medical criteria. It further maintains that the congressional mandate was complied with in the promulgation of 20 C.F.R. § 727.203, which is the regulation governing entitlement to an interim presumption, in later filed claims like Kyle's. That regulation establishes medical standards similar to those in Section 410.490, but it also includes an additional requirement that the miner have ten years of coal mine

employment before he can qualify for the presumption of total disability due to pneumoconiosis.

While courts often defer to an interpretation given a statute by an agency charged with its administration, *see, e.g., United States v. Riverside Bayview Homes,* 474 U.S. 121, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985), this deference is tempered by the role of the courts as "the final authorities on issues of statutory construction . . . [who] 'are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.' " *Federal Maritime Commission v. Seatrain Lines,* 411 U.S. 726, 745-46, 93 S.Ct. 1773, 1784-85, 36 L.Ed.2d 620 (1973) (citations omitted). Manifestly, the term "criteria" is subject to numerous possible interpretations. Accordingly, we need to examine its utilization by the Congress, in the context of other statutory language, and of the history and purpose of the Black Lung Benefits Act, in order to determine whether it should be assigned the narrow meaning urged by the department. *See Local 705. International Brotherhood of Teamsters v. Daniel,* 439 U.S. 551, 565-66, 99 S.Ct. 790, 799-800, 58 L.Ed.2d 808 (1979); *Southeastern Community College v. Davis,* 442 U.S. 397, 411, 99 S.Ct. 2361, 2369, 60 L.Ed.2d 980 (1979).

An examination of legislative history reveals that adopting such a narrow meaning of the term "criteria" would be inconsistent with the purpose of the Act as articulated by several congressional sources. The general purpose of both the 1972 and 1978 amendments to the Act appears to have been to liberalize the standards under which black lung benefits were being awarded at the time. *See* S.Rep. No. 743, 92d Cong.2d Sess. 17, *reprinted in*

1972 U.S. Code Cong. & Ad.News 2305, 2320-21; H.R.Rep. No. 151, 95th Cong.2d Sess. 4, *reprinted in* 1978 U.S. Code Cong. & Ad. News 237, 240. The Third Circuit, in *Echo v. Director, Office of Workers' Compensation Programs,* 744 F.2d 327, 330 (3d Cir. 1984), exhaustively reviewed congressional purpose in regards to the Act and concluded that:

> The legislative history of the Black Lung Program demonstrates a clear pattern. Congress passed a statute intended to provide wide-spread benefits to miners disabled by black lung disease. The benefits, while never very high, were intended to be liberally awarded. Administrative practice, however, did not comport with legislative intent, and twice Congress was impelled to specify its intentions more clearly, "in order to insure as broad coverage as possible." (Citation and footnote omitted.)

Examination of the language of the statute also leads us to reject the department's interpretation of the term "criteria." The department insists that its reading of the term is correct because a sentence found in the subsection immediately preceding 30 U.S.C. § 902(f)(2) states that "the Secretary of Labor . . . shall establish *criteria for all appropriate medical tests* under this subsection which accurately reflect total disability in coal miners" [30 U.S.C. § 902(f)(1)(D) (emphasis added)], and the use of the word "criteria" in the following subsection must be parallel to its previous use. To further buttress this contention, the department cites the opinion in *Peabody Coal Co. v. Director, Office of Workers' Compensation Programs,* 778 F.2d 358, 362 (7th Cir. 1985).

We find that argument less than convincing, since use of the word "criteria" in the previous subsection was specifically limited to the context of "medical tests," while omission of that restrictive terminology in the subsequent subsection only serves to indicate a general usage of the word "criteria" was intended, unencumbered by the limiting terminology. Obviously, Congress did not qualify its use of the term "criteria" in one subsection, but did in another. Since Congress is presumed to act intentionally when it includes particular language in one provision of a statute, but omits that language from another provision, we conclude that "criteria" should be accorded the broader meaning. *See, e.g., Russello v. United States,* 464 U.S. 16, 23, 104 S.Ct. 296, 300, 78 L.Ed.2d 17 (1983).

Our view of the statute is not necessarily in conflict with *Peabody Coal,* since the reference to "medical criteria" in that opinion may be viewed as *dictum* since it was not necessary to the court's holding that the Secretary of Labor did not exceed his authority in promulgating the Section 727.203(a) interim presumption.

We also note that the department's argument, that its position is supported by the legislative history of 30 U.S.C. § 902(f)(2), was made and rejected in *Halon v. Director, Office of Workers' Compensation Programs,* 713 F.2d 21 (3d Cir. 1983), and *Coughan v. Director, Office of Workers' Compensation Programs,* 757 F.2d 966, 968 (8th Cir. 1985). On this point, the *Halon* court held that:

> The plain language of the statute does not suggest that Congress intended any such modification of the generic term "criteria." The legislative history is, at best, equivocal. References in debate to medical criteria are not dispositive . . . . The occasional specific

> mention of medical criteria does not support an inference that non-medical criteria were to be excluded. Other remarks in the debate suggest that the criteria referred to include adjudicatory standards as well as medical standards.

Id. at 24. (Citation omitted.)

Our review of the legislative history leads us to the same conclusion. Accordingly, we see no reason to place ourselves at odds with the position already taken by the Third and Eighth Circuits on the issues raised by this appeal.

Nor does that conclusion conflict with our opinion in *Ramey v. Kentland Elkhorn Coal Corp.*, 755 F.2d 485 (6th Cir. 1985), as suggested by the department.

In *Ramey,* this court was concerned with what specific evidence was required to rebut a presumption of pneumoconiosis under regulations promulgated pursuant to Part C of the Black Lung Act. *See* 20 C.F.R. § 727.203(a). Specifically, *Ramey* held that, even though vocational and medical evidence had been required to rebut the Part B presumption, the Secretary's presentation of medical evidence alone would be sufficient to rebut the Part C presumption. The court reasoned that such a holding was not inconsistent with the no "more restrictive" language because the exact evidence necessary to rebut the presumption was not permanently fixed by the language in 30 U.S.C. § 902(f)(2), which establishes the no "more restrictive" standard.

Ramey should not be read to suggest that the Part B presumptions no longer apply. On the contrary, *Ramey* should be interpreted to hold that, although the Part B

presumptions are preserved, under certain limited circumstances, the specific evidence necessary to rebut those presumptions may be altered over time.

In the case before us, the question is whether the Part B criteria to invoke the presumption of disability are applicable. *Ramey* is not controlling in this context. Since the issue is one of criteria, as opposed to mere evidence, 30 U.S.C. § 902(f)(2) mandates that we apply the criteria set forth in Part B of the regulations. Accordingly, we must remand for a determination of whether the claimant can meet the Part B criteria.

The Board's decision is reversed and this cause is remanded in order that Kyle's claim to the benefit of an interim presumption may be considered in the context of 20 C.F.R. § 410.490.

RALPH B. GUY, Jr., Circuit Judge, concurring in part and dissenting in part.

I agree with the majority that the issue of Kyle's entitlement to an "interim presumption" of disability under 20 C.F.R. § 410.490 is properly before us, but respectfully disagree with their resolution of this issue.

I would read the statute as the Secretary suggests, as requiring that no less restrictive *medical* criteria be incorporated into the regulations. In support of my conclusion, I would offer the reasoning of the dissent in *Halon v. Director, Office of Workers' Compensation Programs,* 713 F.2d 21 (3rd Cir. 1983). In *Halon,* Judge Weis made a thorough analysis of the purpose and legislative history of the statutory language in question, and I find this analysis more persuasive than that of the majority here.

No. 85-3535

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FRED KYLE,
Petitioner,
v.
U.S. DEPARTMENT OF LABOR, ET AL.,
Respondents.

ORDER

BEFORE: MERRITT, GUY and NORRIS, Circuit Judges

The court having received two petitions for rehearing en banc, and the petitions having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petitions for rehearing have been referred to the original hearing panel.

The panel has further reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the case. Accordingly, the petitions are denied.

ENTERED BY ORDER
OF THE COURT

/s/ JOHN P. HEHMAN
JOHN P. HEHMAN, CLERK

Filed
Sep. 22, 1987

No. 85-3535

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FRED KYLE,
Petitioner,
vs.
U.S. DEPARTMENT OF LABOR, DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAM
Respondents.

ORDER

Upon consideration of the motion of the National Council on Compensation Insurance for leave to intervene in behalf of respondent,

IT IS ORDERED that the motion be and it hereby is, GRANTED.

ENTERED BY ORDER
OF THE COURT

/s/ JOHN P. HEHMAN
JOHN P. HEHMAN, CLERK

Filed
Jul. 15, 1987

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FRED KYLE, *Petitioner,* v. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR *Respondents.*	**No. 86-3535**

MOTION FOR LEAVE TO INTERVENE AND TO FILE A PETITION FOR REHEARING

NOW COMES, the National Council on Compensation Insurance ("NCCI"), by and through its attorneys, Pietragallo, Bosick & Gordon, and herewith presents this Motion for Leave to Intervene in the above-styled matter pursuant to F.R.A.P. 15(d) and F.R.C.P. 24. The movants seek intervention to file a Petition for Rehearing and otherwise participate in the litigation, stating as follows:

1. This Honorable Court issued its opinion in the above-styled matter on or about May 18, 1987. The *Kyle* decision interpreted 30 U.S.C.A. Section 902(f)(2) as requiring the application of 20 C.F.R. Section 410.490 ("interim regulations") to Part C claims under the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C.A. Section 901 ("the Act"). This decision effectively invalidated the Department of Labor regulations at 20 C.F.R. Section 727.203 ("DOL regulations") finding them contrary to the statutes' "not more restrictive" language. Accordingly, *Kyle* revived the interim regulations making

them applicable to industry-responsible claims previously thought to be governed by the DOL regulations.

2. This Honorable Court granted Respondents' request for enlargement of time to present a Petition for Rehearing. Said extension extended the time for Petitions for Rehearing until July 1, 1987.

3. The NCCI is a voluntary, nonprofit, statistical research and rate-making organization supported by the insurance industry. Its primary function is the preparation and administration of rates, rating plans and systems for workmen's compensation insurance in thirty-five (35) states. It also administers several multi-state "insurance pools" providing re-insurance for workmen's compensation policies accepted by various pool members, including over 600 insurance company-pool members across the nation. One such "pool" is the National Workers' Compensation Reinsurance Pool, pertaining to policies under the Act. In addition to reinsuring commercially viable policies, the national pool also offers workmen's compensation coverage to coal operators unable to secure coverage in the open market. This assigned-risk function is an interest unique to the NCCI national pool. The NCCI is also a rate-making body which provides actuarial data upon which workmen's compensation rates are based in numerous states. Since such rates are determined, in part, upon past underwriting experience, the revival of the interim regulations and their application to Part C claims against coal mine operators and insurers will effectively nullify the rates and rating plans in thirty-five states. Individual pool members will also be directly affected as they reinsure workmen's compensation policies providing coverage to operator's potentially liable for benefits under Part C of the Act. Insurance reserves set from prior claims experience under the DOL regulations may now be

insufficient to fund liabilities devolving upon NCCI industry members and the national pool.

4. The *Kyle* decision substantially impacts coal mine operators and their insurance carriers by altering the rules upon which their interests will be adjudicated for thousands of pending claims. Yet, the Respondent in *Kyle* was the Department of Labor representing the Black Lung Disability Trust Fund ("Trust Fund"), which is responsible for benefits largely where no responsible coal mine operator can be identified. *See*, 20 C.F.R. Section 725.490(a). No coal mine operator nor carrier participated in the instant litigation. Thus, the rights and interests of the coal and insurance industries have been determined in their absence without notice or opportunity to be heard on these important issues. The presence of the Trust Fund is inadequate to protect those interests as the Fund is not directly liable for Part C benefits, nor does the Fund prepare insurance rates or rating plans.

5. Absent intervention in the present controversy, the Movants will be deprived of any opportunity to protect their interests as *Kyle* substantially determines the rights of Part C litigants in the total absence of Part C defendants.

6. The NCCI only recently learned of the pendency of the rehearing in the *Kyle* matter. As the NCCI will endeavor to comply with the July 1, 1987 deadline hereinbefore mentioned, no undue delay or prejudice will befall the original parties to the litigation.

7. The NCCI seeks intervention to, *inter alia* raise the following arguments:

(a) The 1977 Reform Act setting forth the "not more restrictive" language applied only to

medical criteria as the indentification of Section 410.490, as the "interim medical standard" throughout legislative history clearly indicates. Based upon recommendations from the HEW, DOL and the General Accounting office, Congress rejected the continued use of Section 419.490 to new DOL claims. Congress intended only that the medical standards of Section 419.490 be used as a benchmark for new DOL standards. Since the statutory language refers only to medical standards and since the DOL regulations utilize medical criteria as liberal as Section 419.490, the DOL regulations comport with the "not more restrictive" criterion.

(b) Application of Section 419.490 to responsible operator claims violates the Administrative Procedure Act ("APA"), as the 1972 publication of the proposed Section 410.490 failed to afford coal operators "notice" that the regulatory standard would be applied to operator claims after June 30, 1973. Thus, Section 410.490 is invalid as to coal operators being devoid of compliance with the APA requirements. *See*, 5 U.S.C.A. Section 553.

(d) Section 410.490 is an invalid exercise of administrative rule-making as the regulation is inconsistent with its enabling legislation.

(e) Application of Section 410.490 to responsible-operator claims deprives operators and carriers of constitutional due process by eliminating all but two defenses to the presumption of entitlement. The elimination of these defenses further deprives the operator/carrier

of a full and fair hearing as required by the APA. *See*, 5 U.S.C.A. Section 556(d).

WHEREFORE, the NCCI respectfully moves this Court to grant this Motion for Leave to Intervene and to File a Petition for Rehearing in the above-styled matter.

Respectfully submitted,

PIETRAGALLO, BOSICK & GORDON

By ...../s/ MARK GORDON.....
MARK GORDON, ESQUIRE

By ...../s/ DANIEL D. HARSHMAN.....
DANIEL D. HARSHMAN, ESQUIRE

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion was served upon the following parties of record by U.S. Mail, postage prepaid, this 23rd day of June, 1987:

Julian Henriques, Esq.
Legal Assistance Foundation of Chicago
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/s/ DANIEL D. HARSHMAN

U.S. DEPARTMENT OF LABOR
Benefits Review Board
1111 20th Street, N.W.
Washington, D.C. 20036

BRB No. 82-1968 BLA
OWCP No. 405-03-3687

FRED KYLE, *Claimant-Petitioner,* v. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR *Respondent.*	**NOT-PUBLISHED** **FILED** **MAY 17, 1985** **DECISION** **and** **ORDER**

Appeal of the Decision and Order of Arthur C. White, Administrative Law Judge, United States Department of Labor.

Louise Katz, Houston, Texas, for claimant.

Roscoe C. Bryant III (Francis X. Lilly, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Counsel for Benefits Programs), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: RAMSEY, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (81-BLA-4521) of Administrative Law Judge Arthur C. White denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq.* (the Act). The administrative law judge found that claimant had established 8½ years of coal mine employment and, thus, considered claimant's entitlement pursuant to Subpart D of 20 C.F.R. Part 410. He determined that claimant has pneumoconiosis, but concluded that claimant had failed to establish that he is totally disabled from pneumoconiosis or a chronic lung disease which arose out of his coal mine work.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 932(a).

An administrative law judge's finding of length of coal mine employment will be affirmed where it is based upon a reasonable method of computation and supported by substantial evidence in the record considered as a whole. *Hall v. Director, OWCP*, 2 BLR 1-998 (1980). The administrative law judge's finding that claimant's principal occupation from 1937 to 1951 was that of coal miner reflects that he did take claimant's testimony into consideration. The administrative law judge, however, may credit and rely upon Social Security records where claimant's memory is unreliable. *Tackett v. Director, OWCP*, 6 BLR 1-839 (1984). Since claimant's testimony regarding his coal mine work did not fill in the gaps in the Social Security earnings

record and reflects that he had a difficult time recalling the details of his coal mine employment, the administrative law judge properly relied upon the earnings record. We, therefore, affirm the administrative law judge's finding of 8½ years of coal mine employment as it is based upon substantial evidence.[1]

In finding that claimant had not met the requirements of 20 C.F.R. Part 410, Subpart D, the administrative law judge considered the results of a physical examination performed by Dr. Strauss in January 1979 and medical reports of Dr. Stephen M. Hessl and Dr. Sarah B. Long. Claimant contends that the administrative law judge erred in finding claimant not totally disabled pursuant to Section 410.426(d) in light of the x-rays, medical reports, and lay evidence. Specifically, claimant contends that the administrative law judge erred in relying upon Dr. Long's opinion of no total disability because it is merely a recitation of claimant's medical history rather than a reasoned medical report. Dr. Long's opinion contains an evaluation of the objective data in the record, including the pulmonary function studies and blood gas studies, in addition to a recitation of claimant's symptoms. Her report states her professional opinion that claimant is not disabled by his pneumoconiosis based upon that data.

Claimant also argues that the administrative law judge erred in finding Dr. Long's report consistent with the positive x-ray of record and reports of examining physicians indicating the presence of chronic obstructive lung disease

---

[1]Claimant argues that, assuming ten years of coal mine employment, the sole x-ray of record, which was positive, would invoke the interim presumption pursuant to subsection (a)(1) of 20 C.F.R. § 727.203. Since we affirm the administrative law judge's finding of 8½ years of coal mine employment, we need not address this contention.

and pneumoconiosis. The positive x-ray and other medical reports finding lung disease and pneumoconiosis have no bearing upon the issue of Dr. Long's determination of no *disability* due to pneumoconiosis. *See Arnoni v. Director, OWCP*, 6 BLR 1-423 (1983), *petition for review denied*, 738 F.2d 420 (3d Cir. 1984) (table).

In addition, there is no evidence of record which could support a finding that claimant is totally disabled pursuant to Section 410.426. The pulmonary function studies of record do not meet the criteria set forth in Section 410.426(b). Dr. Strauss did not evaluate the severity of claimant's impairment. Dr. Long explicity stated that claimant is not totally disabled from pneumoconiosis and that any impairment he may have is due to smoking. Dr. Hessl's evaluation of claimant's disability as a "Class III respiratory impairment" amounts to only 25-35% impairment, which the administrative law judge chose not to interpret as establishing total disability. *American Medical Association Guides to the Evaluation of Permanent Impairment* at 75 (1977); *see Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983). Claimant's lay testimony alone, absent corroborating medical evidence, is insufficient to establish total disability by a respiratory or pulmonary impairment pursuant to Part 410. *Centak v. Director, OWCP*, 6 BLR 1-1072 (1984). Accordingly, we affirm the administrative law judge's determination that claimant has not met his burden of proving that he is totally disabled from a chronic lung disease arising out of coal mine employment.[2]

---

[2]Claimant also argues that it was error for the administrative law judge to rely upon Dr. Long's report because she relied heavily on the documented five years of coal mine employment in determining that

(Continued on next page)

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

/s/ ROBERT L. RAMSEY
ROBERT L. RAMSEY, CHIEF
ADMINISTRATIVE APPEALS JUDGE

/s/ ROY P. SMITH
ROY P. SMITH
ADMINISTRATIVE APPEALS JUDGE

/s/ NANCY S. DOLDER
NANCY S. DOLDER
ADMINISTRATIVE APPEALS JUDGE

Dated this 17th
day of May 1985

(Continued)
any disability claimant may have did not arise out of coal mine employment, but rather was caused by his smoking. Claimant also argues that Dr. Long's opinion regarding causation does not meet *Blevins* standards. *See Blevins v. Peabody Coal Co.*, 6 BLR 1-750 (1983). We need not address these contentions because the administrative law judge's denial of benefits was based primarily on his finding that claimant is not totally disabled. The discrepancy between five years and 8½ years of coal mine employment would not alter Dr. Long's conclusion of no total disability. *See O'Neal v. Director, OWCP*, 6 BLR 1-1132 (1984).

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
1111 20th Street, N.W.
Washington, D.C. 20036

DATE ISSUED: SEPT 22, 1982

In the Matter of

FRED KYLE,
Claimant,
v.
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party in Interest.

Case No. 81-BLA-4521
OWCP No. 405-03-3687

LOUISE KATZ, ESQ.
For the Claimant

ROSOCE C. BRYANT, III, ESQ.
For the Party In Interest

Before: ARTHUR C. WHITE
Administrative Law Judge

DECISION AND ORDER-REJECTION OF CLAIM

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. § 901 *et seq.* In accordance with the Act, and the regulations issued thereunder, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs for a formal hearing.

Benefits under the Act are awardable to persons who are totally disabled within the meaning of the Act due to pneumoconiosis or to the survivors of persons who were

so totally disabled at the time of their death or whose death was caused by pneumoconiosis. Pneumoconiosis is a dust disease of the lungs arising from coal mine employment and is commonly known as black lung.

A formal hearing was held[1] in Chicago, Illinois, on May 25, 1982, at which all parties were afforded full opportunity to present evidence and argument, as provided in the Act and the regulations issued thereunder, found in Title 20 of Federal Regulations. Regulation section numbers mentioned in this Decision and Order refer to sections of that Title.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Coal Miner

The claimant was a coal miner within the meaning of § 402(d) of the Act and § 725.202 of the regulations for approximately 8½ years ending in 1951. I find that Mr. Kyle's principal occupation from 1937 to 1951 was that of a coal miner except for the 3½ years he spent in military service. However, he had earnings from coal mine employment for only 34 quarters, so it can be seen that his coal mine work was rather sporadic. Even though he worked as a coal miner during 19 quarters between the second quarter of 1937 to the second quarter of 1942, and he did some coal mine work during approximately 17 quarters between 1946 and 1951, I am unable to credit him with more than 8½ years of coal mine work. I have given him credit for several quarters in which the Social Security records reflect less than one month of work, assuming he was paid the

[1]The transcript of hearing will be hereafter referred to as T.; other abbreviations will be as follows: Director's exhibits D.; and Claimant's exhibits, C.

minimum wage rate then in effect. Mr. Kyle has the burden of establishing his period of coal mine work. See *Rennie v. United States Steel Corp.*, 1 BLR 1-859 (1978). He has established less than 10 full years of work in the mines.

Date of Filing

The claimant filed his claim for benefits under the Act on February 15, 1980. The claim is timely filed since no limitations in the Act on the time within which claims may be filed are applicable to claims filed on the date the claim was filed in this case.

Pneumoconiosis and Total Disability

Mr. Kyle underwent a chest x-ray in April 1980 (D. 12, 13) which was interpreted by J. J. Fitzpatrick, M.D., a board-certified radiologist, to show l/o pneumoconiosis. In view of the opinion of the Benefits Review Board in the case of *Tobias v. Republic Steel Corp.*, 2 BLR 1-1277 (1981), I consider the opinion of Dr. Pitman (D. 13) only to the extent he found the x-ray film to be of acceptable quality. I, therefore, determine that Mr. Kyle has pneumoconiosis and that it has been depicted by x-ray § 410.414(a)).

As Mr. Kyle had less than 10 years of coal mine work and his claim was filed prior to the effective date of Part 718 of the regulation, his claim must be adjudicated under the provisions of Part 410.

Under the provisions of § 410.424(a), a miner may be presumed to be totally disabled if blood gas studies reveal impairment of the transfer of oxygen from the lungs to the blood as set forth in the appendix of Part 410, or if cor pulmonale or congestive heart failure with the symptoms described in the appendix are manifest. As claimant's

blood gas studies have been substantially within normal limits and as cor pulmonale or congestive heart failure has not been established, Mr. Kyle is not presumed to be totally disabled under § 410.424(a).

The next criterion for considering the question of total disability, is set forth in § 410.426. In this regard, pulmonary function studies with findings at or below the levels set forth in subparagraph (b) would invoke the presumption of total disability. Initially, I conclude that claimant is 70" tall. It would be necessary for his pulmonary function studies to show an FEV_1 of 1.8 or lower and a MVV of 65 or lower for Mr. Kyle to be presumed to be totally disabled under this subsection. In March 1979, Mr. Kyle's FEV_1 was 3.1 and his MVV was 106. In April 1980, his FEV_1 was 2.5 and his MVV was 46.8. Hence, he may not be presumed to be totally disabled under § 410.426(b).

Mr. Kyle could also be presumed to be totally disabled under § 410.426(d). This regulation would be applicable if other relevant medical evidence established the existence of a chronic pulmonary disease which was of such severity that it precluded the claimant from accomplishing his previous coal mine work and also considering his age, his education and his work experience, prevented him from performing comparable and gainful work. It would also be necessary to show that the chronic pulmonary disease arose out of employment in the nation's coal mines. (§ 410.414(c)).

When claimant was examined in January 1979 (D. 6), tactile fremitus, percussion, resonance and vocal resonance were equal or normal bilaterally. There were no rales, rhonchi or wheezing. X-rays showed overaeration of the lungs, which apparently formed the basis for the diagnosis of chronic obstructive lung disease. S.M. Hessl, M.D.,

examined claimant in May 1980 (D. 15). The doctor diagnosed chronic bronchitis and coal workers' pneumoconiosis which he attributed to coal mine work. He concluded that claimant had an AMA Class III respiratory impairment. Diagnosis were also reported of arteriosclerotic heart disease and right bundle branch block.

Claimant's file was referred to a medical consultant (D. 17) who concluded that he was not totally disabled from pneumoconiosis or a respiratory standpoint. The physician also concluded that the claimant's history of smoking was the primary cause of any respiratory disability he had.

Mr. Kyle has the burden of proving that his pneumoconiosis arose out of his coal mine work and that he is totally disabled because of the disease. (§ 410.414(b)). While Dr. Hessl states that Mr. Kyle has an AMA Class III respiratory impairment which arose out of his coal mine work, the Department of Labor medical consultant concludes that claimant is not totally disabled from a respiratory standpoint and that any respiratory disability he has is unrelated to his coal mine work.

I am not bound by the theory or opinion of any given medical witness. *See Todd Shipyard Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). However, I do consider Dr. Long's opinion to be in keeping with the objective findings or lack thereof, which are normally considered to be indicative of a significantly disabling respiratory disease. Further, claimant's post-1951 work history as demonstrated by his Social Security records in addition to his smoking history could very well account for his chronic obstructive lung disease and the overaeration of his lungs. In any event, I conclude that Mr. Kyle has not met his burden of proving that he is totally disabled from pneumoconiosis or

a chronic lung disease which arose out of his coal mine work.

Entitlement

The claimant is not entitled to black lung benefits.

Attorney's Fee

The award of an attorney's fee under the Act is permitted only in cases in which the claimant is found to be entitled to the receipt of benefits. Since benefits are not awarded in this case the Act prohibits the charging of any fee to the claimant for representation services rendered to him in pursuit of his claim.

ORDER

The claim of Fred Kyle for benefits under the Act is denied.

/s/ ARTHUR C. WHITE
ARTHUR C. WHITE
ADMINISTRATIVE LAW JUDGE

UNITED STATES CONSTITUTION
AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ADMINISTRATIVE PROCEDURE ACT

* * *

§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

* * *

§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

* * *

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion or irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557(d) of this title sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be

prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

BLACK LUNG BENEFITS REFORM ACT OF 1977

§ 402. Definitions

For purposes of this title—

* * *

(f)(1) The term "total disability" has the meaning given it by regulations of the Secretary of Health, Education, and Welfare for claims under part B of this title, and by regulations of the Secretary of Labor for claims under part C of this title, subject to the relevant provisions of subsections (b) and (d) of section 413, except that—

(A) in the case of a living miner, such regulations shall provide that a miner shall be considered totally disabled when pneumoconiosis prevents him or her from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity and over a substantial period of time;

(B) such regulations shall provide that (i) a deceased miner's employment in a mine at the time of death shall not be used as conclusive evidence that the miner was not totally disabled; and (ii) in the case of a living miner, if there are changed circumstances of employment indicative of reduced ability to perform his or her usual coal mine work, such miner's employment in a mine shall not be used as conclusive evidence that the miner is not totally disabled;

(C) such regulations shall not provide more restrictive criteria than those applicable under section 223(d) of the Social Security Act; and

(D) the Secretary of Labor, in consultation with the Director of the National Institute for Occupational Safety and Health, shall establish criteria for all appropriate medical tests under this subsection which accurately reflect total disability in coal miners as defined in subparagraph (A).

(2) Criteria applied by the Secretary of Labor in the case of—

(A) any claim which is subject to review by the Secretary of Health, Education, and Welfare, or subject to a determination by the Secretary of Labor, under section 435(a);

(B) any claim which is subject to review by the Secretary of Labor under section 435(b); and

(C) any claim filed on or before the effective date of regulations promulgated under this subsection by the Secretary of Labor;

shall not be more restrictive that the criteria applicable to a claim filed on June 30, 1973, whether or not the final disposition of any such claim occurs after the date of such promulgation of regulations by the Secretary of Labor.

REGULATIONS OF HEALTH, EDUCATION, & WELFARE

§ 410.490 Interim adjudicatory rules for certain Part B claims filed by a miner before July 1, 1973, or by a survivor where the miner died before January 1, 1974.

(a) *Basis for rules.* In enacting the Black Lung Act of 1972, the Congress noted that adjudication of the large backlog of claims generated by the earlier law could not await the establishment of facilities and development of

medical tests not presently available to evaluate disability due to pneumoconiosis, and that such claims must be handled under present circumstances in the light of limited medical resources and techniques. Accordingly, the Congress stated its expectancy that the Secretary would adopt such interim evidentiary rules and disability evaluation criteria as would permit prompt and vigorous processing of the large backlog of claims consistent with the language and intent of the 1972 amendments and that such rules and criteria would give full consideration to the combined employment handicap of disease and age and provide for the adjudication of claims on the basis of medical evidence other than physical performance tests when it is not feasible to provide such tests. The provisions of this section establish such interim evidentiary rules and criteria. They take full account of the congressional expectation that in many instances it is not feasible to require extensive pulmonary function testing to measure the total extent of an individual's breathing impairment, and that an impairment in the transfer of oxygen from the lung alveoli to cellular level can exist in an individual even though his chest roentgenogram (X-ray) or ventilatory function tests are normal.

(b) *Interim presumption.* With respect to a miner who files a claim for benefits before July 1, 1973, and with respect to a survivor of a miner who dies before January 1, 1974, when such survivor timely files a claim for benefits, such miner will be presumed to be totally disabled due to pneumoconiosis, or to have been totally diabled due to pneumoconiosis at the time of his death, or his death will be presumed to be due to pneumoconiosis, as the case may be, if:

(1) One of the following medical requirements is met:

(i) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis (see § 410.428); or

(ii) In the case of a miner employed for at least 15 years in underground or comparable coal mine employment, ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (which meets the requirements for duration in § 410.412(a)(2)) as demonstrated by values which are equal to or less than the values specified in the following table:

	Equal to or less than—	
	FEV_1	MVV
67″ or less	2.3	92
68″	2.4	96
69″	2.4	96
70″	2.5	100
71″	2.6	104
72″	2.6	104
73″ or more	2.7	108

(2) The impairment established in accordance with paragraph (b)(1) of this section arose out of coal mine employment (see §§ 410.416 and 410.456).

(3) With respect to a miner who meets the medical requirements in paragraph (b)(1)(ii) of this section, he will be presumed to be totally disabled due to pneumoconiosis arising out of coal mine employment, or to have been totally disabled at the time of his death due to pneumoconiosis arising out of such employment, or his death will be presumed to be due to pneumoconiosis arising out of such employment, as

the case may be, if he has at least 10 years of the requisite coal mine employment.

(c) *Rebuttal of presumption.* The presumption in paragraph (b) of this section may be rebutted if:

(1) There is evidence that the individual is, in fact, doing his usual coal mine work or comparable and gainful work (see § 410.412(a)(1)), or

(2) Other evidence, including physical performance tests (where such tests are available and their administration is not contraindicated), establish the the individual is able to do his usual coal mine work or comparable and gainful work (see § 410.412(a)(1)).

(d) *Application of presumption on readjudication.* Any claim initially adjudicated under the rules in this section will, if the claim is for any reason thereafter readjudicated, be readjudicated under the same rules.

(e) *Failure of miner to qualify under presumption in paragraph (b) of this section.* Where it is not established on the basis of the presumption in paragraph (b) of this section that a miner is (or was) totally disabled due to pneumoconiosis, or was totally disabled due to pneumoconiosis at the time of his death, or that his death was due to pneumoconiosis, the claimant may nevertheless establish the requisite disability or cause of death of the miner under the rules set out in §§ 410.412 to 410.462.

REGULATIONS OF DEPARTMENT OF LABOR

§ 727.203 Interim presumption

(a) *Establishing interim presumption.* A miner who engaged in coal mine employment for at least 10 years will be presumed to be totally disabled due to pneumoconiosis,

or to have been totally disabled due to pneumoconiosis at the time of his death, or death will be presumed to be due to pneumoconiosis, arising out of that employment, if one of the following medical requirements is met:

(1) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis (see § 410.428 of this title);

(2) Ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (which meets the requirements for duration in § 410.412(a)(2) of this title) as demonstrated by values which are equal to or less than the values specified in the following table:

	Equal to or less than—	
	FEV$_1$	MVV
67″ or less	2.3	92
68″	2.4	96
69″	2.4	96
70″	2.5	100
71″	2.6	104
72″	2.6	104
73″ or more	2.7	108

(3) Blood gas studies which demonstrate the presence of an impairment in the transfer of oxygen from the lung alveoli to the blood as indicated by values which are equal to or less than the values specified in the following table:

Arterial pO_2	Arterial pCO_2 equal to or less than (mm. Hg.)
30 or below	70.
31	69.
32	68.
33	67.
34	66.
35	65.
36	64.
37	63.
38	62.
39	61.
40-45	60.
Above 45	Any value.

(4) Other medical evidence, including the documented opinion of a physician exercising reasoned medical judgment, establishes the presence of a totally disabling respiratory or pulmonary impairment;

(5) In the case of a deceased miner where no medical evidence is available, the affidavit of the survivor of such miner or other persons with knowledge of the miner's physical condition, demonstrates the presence of a totally disabling respiratory or pulmonary impairment.

(b) *Rebuttal of interim presumption.* In adjudicating a claim under this subpart, all relevant medical evidence shall be considered. The presumption in paragraph (a) of this section shall be rebutted if:

(1) The evidence establishes that the individual is, in fact, doing his usual coal mine work or comparable and gainful work (see § 410.412(a)(1) of this title); or

(2) In light of all relevant evidence it is established that the individual is able to do his usual coal mine work or comparable and gainful work (see § 410.412(a)(1) of this title); or

(3) The evidence establishes that the total disability or death of the miner did not arise in whole or in part out of coal mine employment; or

(4) The evidence establishes that the miner does not, or did not, have pneumoconiosis.

(c) *Applicability of Part 718.* Except as is otherwise provided in this section, the provisions of Part 718 of this subchapter as amended from time to time, shall also be applicable to the adjudication of claims under this section.

(d) *Failure of miner to qualify under the presumption in paragraph (a) of this section.* Where eligibility is not established under this section, such eligibility may be established under Part 718 of this subchapter as amended from time to time.